

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)		
)		
RSL COM U.S.A.)		ISP-97-M-413
)		
Petition for Waiver of the)		
International Settlements Policy)		
to Change the Accounting Rate)		
for Switched Voice Service with)		
the Dominican Republic)		

MEMORANDUM, OPINION AND ORDER

Adopted: January 15 , 1999

Released: January 21 , 1999

By the Chief, Telecommunication Division:

I. Introduction

1. We have before us a petition filed by RSL COM U.S.A. ("RSL") to waive the Commission's International Settlements Policy (ISP)¹ to change the accounting rate for switched voice service with the Dominican Republic. For the reasons stated below, RSL's modification request is denied. We also find that accounting rates previously negotiated by RSL for service with the Dominican Republic, which were never filed with the Commission, do not violate the Commission's ISP.

II. Background

¹ The ISP requires uniform accounting rates, uniform terms for the sharing of tolls, and uniform settlement rates among U.S. carriers providing the same service to the same foreign point. The ISP also requires that U.S. carriers accept only their proportionate share of return traffic. *See Implementation of Uniform Settlements Policy for Parallel International Communications Routes*, 51 Fed. Reg. 4736 (1986) (*ISP Order*); *Reconsideration*, 2 FCC Rcd 1118 (1987); *Further Reconsideration*, 3 FCC Rcd 1614 (1988). In 1991, the Commission reformed the ISP to encourage and facilitate accounting rate reductions by U.S. carriers. *See Regulation of International Accounting Rates*, 6 FCC Rcd 3553 (1991) (*Phase I Report and Order*); *Reconsideration*, 7 FCC Rcd 8049 (1992). *See Regulation of International Accounting Rates*, 7 FCC Rcd 8040 (1992) (*Phase II Second Report & Order and Second Further Notice of Proposed Rulemaking*). In 1996, the Commission codified the proportionate return policy. *See Fourth Report and Order on Regulation of International Accounting Rates*, 11 FCC Rcd 20063 (1997) (*Flexibility Order*). The Commission's Rules require a U.S. carrier to file with the Commission a notification letter, modification request, or petition for declaratory, as appropriate, if it seeks to change the accounting rate with a foreign carrier. (47 C.F.R. Ch.1§43.51(d)(2)).

2. RSL, by its attorneys, filed a request for modification of the Commission's ISP for switched voice service² that would change its accounting rate with its correspondent in the Dominican Republic, Compania Dominicana de Telefonos, C. por A. ("CODETEL"). RSL seeks approval to introduce a rate of \$1.10. The effective date is January 1, 1997. The rate proposed by RSL would replace a settlement arrangement that has an accounting rate of \$1.10 per minute during the full period, \$0.70 per minute during the reduced period,³ and \$0.70 for all minutes in excess of 100,000 in a month.

3. On August 8, 1997, AT&T Corp. ("AT&T") filed an opposition to RSL's petition for modification in which it also complained about RSL's failure to notify the Commission about earlier dealings with CODETEL.⁴ On August 20, 1997, RSL, by its attorneys, filed a reply to AT&T's opposition.⁵ On August 29, 1997, AT&T filed a response to the reply filed by RSL.⁶ On February 8, 1998, the Commission's International Bureau requested additional information from RSL on its modification request.⁷ On February 27, 1998, RSL, by its attorneys, filed a response to the Bureau's request for additional information.⁸

III. Discussion

4. The Commission's longstanding policy is to reduce accounting rates towards cost-based levels. To promote this objective, the Commission issued several accounting rate orders and decisions aimed at accounting rate reform.⁹ The Commission has vigorously supported the U.S. Government's

² See RSL's International Settlements Policy Modification to Change the Accounting Rate for International Switched Voice Service to the Dominican Republic, ISP-97-M-413 (filed July 9, 1997, amended July 18, 1997).

³ The full rate period is in effect from 7:00 A.M. to 12:00 midnight. The reduced rate period is in effect from 12:00 midnight to 7:00 A.M.

⁴ See Letter to William F. Caton, Acting Secretary, FCC, from Martin Gitter, AT&T (filed August 8, 1997) (AT&T Opposition).

⁵ See Letter to William F. Caton, Acting Secretary, FCC, from Eric Fishman, Attorney for RSL COM U.S.A., Inc. and Cyberlink, Inc. (filed August 20, 1997) (RSL Reply).

⁶ See Letter to William F. Caton, Acting Secretary, FCC, from Martin Gitter, AT&T (filed August 29, 1997) (AT&T Reply).

⁷ See Letter to Eric Fishman, Attorney for RSL COM U.S.A., Inc., from Troy F. Tanner, Chief, Policy and Facilities Branch, Telecommunications Division, International Bureau (February 9, 1998).

⁸ See Letter to Troy F. Tanner, Chief, Policy and Facilities Branch, Telecommunications Division, International Bureau, FCC, from Eric Fishman, Attorney for RSL COM U.S.A., Inc. (February 27, 1998).

⁹ See, e.g., *Order on Reconsideration on Regulatory Policies and International Telecommunications*, 4 FCC Rcd 323 (1988), *Notice of Proposed Rulemaking on Regulation of International Accounting Rates*, 5 FCC Rcd 4948 (1990), *Report and Order on Regulation of International Accounting Rates*, 6 FCC Rcd 3552 (1991), *Second Report and Order and Second Further Notice of Proposed Rulemaking on Regulation of International Accounting Rates*, 7 FCC Rcd 8040 (1992), *Policy Statement on*

position on accounting rates before the International Telecommunication Union and strongly endorsed its recommendation for the expeditious achievement of cost-orientated, nondiscriminatory accounting rates. Accounting rates that more closely reflect the cost of terminating international telephone calls promote the U.S. public interest by providing the basis for lower calling prices to U.S. consumers, encouraging economic efficiency, and helping to control growth in U.S. net settlement payments. Conversely, increases in accounting rates raise the cost of providing international message telephone service to U.S. carriers and, ultimately raise calling prices to U.S. consumers. This is a particularly acute problem when accounting rates are already substantially higher than costs. For these reasons, the Commission's ISP places the burden on a U.S. carrier to demonstrate that the public interest would be served by approving non-cost-based increases in an accounting rate.¹⁰

5. RSL fails to meet this burden in its modification request. AT&T opposes RSL's request on the grounds that the proposed accounting rate is higher than the rate that was approved by the Commission for service between other U.S. carriers and CODETEL that took effect on January 1, 1997.¹¹ We agree with AT&T. Other U.S. carriers filed waivers with the Commission to introduce an accounting rate of \$0.80 a minute with CODETEL, effective January 1, 1997.¹² The rate was allowed to go into effect because there was no opposition to the waivers. Obviously, the accounting rate proposed by RSL for service with CODETEL exceeds the approved \$0.80 rate.

6. RSL's filing also represents an increase its own accounting rate with CODETEL. A comparison of the arrangement in effect prior to the time the new rate would go into effect makes this clear. With the proposal before us, RSL's settlement payments to CODETEL would be based on an accounting rate of \$1.10 per minute. This rate would replace a settlement arrangement that has an accounting rate of \$1.10 for some service and a rate of \$0.70 for a large portion of RSL's service with CODETEL. Using information submitted by RSL, we estimate that RSL's average settlement rate was 35.4¢ per minute for service transmitted to CODETEL for termination in the Dominican Republic when the accounting rates were \$1.10 for the full rate period and \$0.70 for the reduced rate period. In comparison, RSL's new settlement rate would be \$0.55 per minute if we approve its proposal.

7. RSL provides no justification for the increase in its accounting rate with CODETEL. Consistent with our policy of disapproving unjustified, non-cost-based, accounting rate increases, we deny RSL's waiver to introduce an accounting rate of \$1.10, and direct RSL to negotiate an accounting rate with CODETEL that does not violate the Commission's accounting rate policy or the ISP. In order

International Accounting Rate Reform, 11 FCC Rcd 3146 (1996), *Fourth Report and Order on Regulation of International Accounting Rates*, 11 FCC Rcd 20063 (1997), *Report and Order on International Settlement Rates*, 12 FCC Rcd 19806 (1997) *aff'd. subnom.*, *Cable and Wireless v. FCC*, No. 97-1612 (D.C. Cir., January 12, 1999). *Report and Order and Order on Reconsideration on Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, 12 FCC Rcd 23891 (1997).

¹⁰ See *Phase I Report and Order* 6 FCC Rcd at 3557, and *Phase II Second Report and Order* 7 FCC Rcd at 8040.

¹¹ AT&T Opposition at 2.

¹² See, e.g., Sprint, Petition for Waiver, USP-96-W-133, (filed April 9, 1996), WorldCom, Petition for Waiver, USP-96-W-154, (filed April 26, 1996), and American Telephone and Telegraph Company, Petition for Waiver, USP-96-W-222, (filed June 6, 1996).

ensure that the new rate RSL negotiates with CODETEL is not a violation of the Commission's rules, we will require RSL to include information in its petition for modification for the new accounting rate demonstrating that the rate it negotiates with CODETEL is not higher than either the arrangement it replaces or the arrangement between other U.S. carriers and CODETEL that was in effect when RSL's new arrangement would take effect.

8. In addition to opposing RSL's filing on the grounds that it would be an increase in the accounting rate, AT&T argues that International Telecommunications Corporation ("ITC"), the predecessor company of RSL, did not file a waiver for its initial accounting rate agreement with CODETEL, as required by the Commission's rules, and that ITC also failed to file a waiver when it subsequently negotiated a reduction in the rates of that agreement.¹³ AT&T alleges that ITC had lower, preferential rates with CODETEL than AT&T was able to negotiate, in violation of our requirement for nondiscriminatory treatment of U.S. carriers.¹⁴ AT&T requests that the Commission suspend RSL's petition, investigate RSL's settlement rates and payments to CODETEL, order all U.S. carriers to settle with CODETEL at RSL's lower rate, fine RSL for its failure to file an accounting rate waiver with the Commission, and deny requests by RSL for rates that exceed already approved rates with CODETEL.

9. We agree with AT&T that neither ITC nor RSL filed waivers for the initial accounting rate agreement with CODETEL or the subsequent change in that agreement. Because ITC never filed the waivers for these accounting rates with CODETEL, the rates cannot be deemed to have been granted by the Commission. RSL acknowledges this failure and requests a waiver of the requirements in this instance.¹⁵ RSL provides no reason for us to waive our rules.

10. Although we agree with AT&T that ITC/RSL violated our rules when it failed to file waivers for its accounting rates with CODETEL, RSL has provided sufficient information in its reply and its response to the Bureau's information request to enable us to evaluate whether ITC's initial accounting rate agreement with CODETEL and the subsequent reduction in rates leading up to RSL's proposal to introduce an accounting rate of \$1.10 comply with the Commission's ISP. This information has enabled the staff to reconstruct ITC's and RSL's accounting rate history with CODETEL and evaluate the changes that have occurred since service was initiated in 1994. Because this information bears on our decision to reject RSL's petition for modification, we briefly review the history below. We can also evaluate AT&T's other allegations against RSL on the basis of the information RSL submitted. Thus, rather than waive the Commission's rules, further delay a resolution of the issues raised by AT&T, or impose a fine on RSL as suggested by AT&T,¹⁶ we believe a more prudent approach to dealing with AT&T's complaint is to resolve it in this order. We will, therefore, also determine whether ITC's initial settlement arrangements with CODETEL violate the Commission's ISP in this order.

11. ITC initiated service with CODETEL on May 31, 1994. The accounting rates negotiated (but never filed) between ITC and CODETEL at that time were \$1.30 per minute for calls during the full

¹³ AT&T Opposition at 2.

¹⁴ AT&T Opposition at 2.

¹⁵ RSL Reply at 2.

¹⁶ AT&T Opposition at 2.

period and \$0.60 per minute for calls during the reduced period. In addition, all minutes exceeding a threshold level of 300,000 in a month would also be settled at \$0.60. We approved these same rates for other U.S. carriers with CODETEL.¹⁷ Subsequently, ITC and CODETEL negotiated a new agreement, which was not filed with the Commission, that lowered the full period rate to \$1.10 per minute, changed the reduced period rate to \$0.70, and reduced the threshold level to 100,000 per month. These rates would go into effect on July 1, 1995, if approved. They match accounting rates negotiated by CODETEL with other U.S. carriers.¹⁸ RSL then negotiated another agreement with CODETEL, which it filed and which we reject in this order, to change the accounting rate to \$1.10 per minute for all minutes and the agreement had an effective date of January 1, 1997. The prevailing rate other carriers had with CODETEL was \$0.80 per minute. Finally, RSL indicates that it negotiated (but has not filed) an accounting rate of \$0.70 per minute with CODETEL that would take effect on March 1, 1997. This rate matches other U.S. carriers' rate with CODETEL.

12. AT&T charges that ITC received preferential treatment from CODETEL with its first two accounting rate agreements resulting in discrimination against other U.S. carriers. We disagree. We have found that the issue of discrimination as it relates to accounting rate dealings with foreign carriers includes the accounting rates as well as the dates when those rates take effect.¹⁹ If approved, ITC's accounting rates with CODETEL upon initiation of service on May 31, 1994, would be the same as the rates AT&T negotiated with CODETEL and put into effect on April 1, 1994, but ITC's threshold level of minutes would be much lower than AT&T's. Subsequently, AT&T negotiated a new agreement with CODETEL to lower its accounting rates to \$1.10 during the full period and \$0.60 during the reduced period. These rates took effect on January 1, 1995. ITC's rates with CODETEL remained at \$1.30 and \$0.60 after AT&T's rates with CODETEL declined. Both U.S. carriers then reached agreement to reduce the rates with CODETEL to \$1.10 during the full period, \$0.70 per minute during the reduced period, and \$0.70 for minutes exceeding the threshold level beginning on July 1, 1995. The threshold levels for both U.S. carriers were also significantly reduced as part of their agreements with CODETEL. AT&T then negotiated yet another agreement with CODETEL to reduce its rate to \$0.90 on January 1, 1996, and to \$0.80 on January 1, 1997. ITC's rates remained at \$1.10 and \$0.70 after AT&T's accounting rate with CODETEL declined.

13. We have determined that different U.S. carrier threshold levels may result in nondiscriminatory, growth-based settlement arrangements if there are differences in the level of service transmitted by U.S. carriers to a foreign carrier.²⁰ Thus, we do not believe that the mere existence of

¹⁷ See, e.g., American Telephone and Telegraph Company, Petition for Waiver, USP-94-W-327, filed August 26, 1994. MCI's threshold level of minutes for the lower rate was 11 million minutes per quarter, while AT&T's threshold level of minutes for the lower rate was 32 million minutes per quarter. See also American Telephone and Telegraph Company, *Order and Authorization*, 9 FCC Rcd 5277 (1994).

¹⁸ See, e.g., MCI, Petition for Waiver, USP-95-W-227, filed May 1, 1995, and American Telephone and Telegraph Company, Petition for Waiver, USP-95-W-385, filed August 10, 1995. MCI's threshold level of minutes for the lower rate remained at 11 million minutes per quarter, and AT&T's threshold level of minutes for the lower rate was reduced to 11 million minutes per quarter.

¹⁹ See *Phase I Report and Order* 6 FCC Rcd at 3555 and n. 36.

²⁰ See AT&T and MCI, *Order and Authorization*, 9 FCC Rcd 5277 (1994), and AT&T and MCI, *Memorandum Opinion, Order, and Authorization*, DA 97-1952 (rel. September 10, 1997).

different U.S. carrier threshold levels necessarily constitutes preferential treatment or discrimination. ITC's threshold level is substantially lower than AT&T's in its initial settlement arrangement with CODETEL, but ITC was a new entrant into the international service market at that time. The information submitted by RSL in response to the Bureau's letter shows that ITC provided a substantially smaller volume of service to the Dominican Republic than AT&T, which is an important consideration in assessing the allegation that CODETEL discriminated against AT&T and gave preferential treatment to ITC in their settlement arrangement. Moreover, when ITC and AT&T entered into new growth-based arrangements with CODETEL, the agreements of both U.S. carriers contained significant reductions in threshold levels at which the reduced rate is used to compute settlement payments. In fact, their threshold levels declined by almost the same relative amount. In the case of ITC, its threshold level declined from 300,000 to 100,000 minutes, while AT&T's declined from 32 million to 11 million minutes.

14. Finally, we have been unable to detect evidence of preferential treatment afforded to ITC in our analysis of the settlement data submitted by RSL for ITC's service with CODETEL. A comparison of ITC's data with similar information for AT&T on its settlements for service with the Dominican Republic should reveal some indication of preferential treatment or discrimination if it occurred. A way to detect preferential treatment is to compare each carriers' net settlement payment per minute for service from the conterminous United States to the Dominican Republic. If ITC was favored by CODETEL in its settlement arrangement, there should be a noticeable difference between its net settlement payment per minute and AT&T's. Using data filed by RSL, we estimate that ITC's average net settlement payment per minute in 1995 was 27.6¢ for service with CODETEL. Based on data filed by AT&T pursuant to Section 43.61 of the Commission's rules, we estimate that its average net settlement payment per minute in 1995 was 28.9¢ for service from the conterminous United States to the Dominican Republic. These figures dropped to 19.7¢ for ITC and 21.6¢ for AT&T in 1996.

15. We would not be surprised to see some difference between the two carrier's average payment figures because the small and declining difference could be explained by factors other than the settlement arrangements themselves. The slightly higher figures for AT&T in each year could result from lower calling prices charged by ITC for service to the Dominican Republic, successful marketing efforts by ITC to stimulate demand, the inclusion in AT&T's data of service with other carriers in the Dominican Republic, and accounting rate surcharges for service classifications like received collect service provided by AT&T. In view of the fact that AT&T's growth-based arrangements with CODETEL had the same accounting rates as ITC's arrangements would have, that AT&T successfully negotiated interim accounting rate reductions with CODETEL when ITC's arrangements would be in effect, and that small differences in average settlement payments may be the result of other factors, there is insufficient evidence to warrant a finding that ITC received preferential treatment from CODETEL or that AT&T was discriminated against by CODETEL.

16. Contrary to AT&T's request, we do not believe it is necessary to fine RSL for ITC's failure to file its first two negotiated accounting rate agreements with CODETEL. RSL/ITC did not violate the Commission's ISP and no significant harm resulted from their actions. Moreover, the failure to comply with the Commission's rules by not filing in a timely manner the appropriate petitions for waiver to change the accounting rate with CODETEL was the action by RSL's predecessor, ITC. However, we take seriously the failure of a U.S. carrier to comply with the Commission's rules and, therefore, we will monitor closely RSL to ensure its strict compliance with the rules.

IV. Conclusion

17. We find that RSL's proposal to change its accounting rate with CODETEL to \$1.10 represents an increase in a rate that has been approved and is not in the public interest. We therefore deny RSL's modification request. We also find that ITC's accounting rate agreements with CODETEL that implement rates of \$1.30 and \$0.60, and \$1.10 and \$0.70 are in the public interest. We therefore approve them. We also find that AT&T has not demonstrated that ITC benefited from preferential treatment at the hands of CODETEL or that CODETEL discriminated against AT&T.

V. Ordering Clauses

18. Accordingly, IT IS ORDERED that RSL's request to establish an accounting rate with CODETEL of \$1.10 per minute is DENIED. We hereby direct RSL to negotiate an accounting rate with CODETEL that does not violate our accounting rate policy or the ISP.

19. IT IS FURTHER ORDERED that RSL shall seek approval of its accounting rate of \$0.70 per minute effective March 1, 1997, with CODETEL in accordance with the Commission's rules pertaining to accounting rate changes.

20. IT IS FURTHER ORDERED that RSL's agreement with CODETEL for an accounting rate of \$1.30 per minute during the full rate period, \$0.60 per minute during the reduced rate period, and \$0.60 per minute for service exceeding 300,000 per month with an effective date of May 31, 1994, is APPROVED.

21. IT IS FURTHER ORDERED that RSL's agreement with CODETEL for an accounting rate of \$1.10 per minute during the full rate period, \$0.70 per minute during the reduced rate period, and \$0.70 per minute for service exceeding 100,000 per month with an effective date of July 1, 1995, is APPROVED.

22. IT IS FURTHER ORDERED that AT&T's request to investigate and fine RSL, if warranted by the investigation, is DENIED.

23. This order is effective upon adoption. Petitions for reconsideration under Section 1.106 of the Commission's rules may be filed within 30 days of the public notice of this order (*see* Section 1.4(b)(2) of the Commission's rules).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau